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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1054.

THE CHILDREN OF ISRAEL,
a Corporation, *et al.*,
Appellants,

vs.

SAUL TAMARKIN, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS APPEAL.

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Appellees move the Court to dismiss the appeal herein on the following grounds:

(a) The appeal is not within the jurisdiction of this Court because not taken in accordance with the Revised Rules of this Court.

(b) The appeal does not present a substantial federal question.

(c) The federal question sought to be reviewed was not timely or properly raised.

I. THE APPEAL WAS NOT TAKEN IN CONFORMITY TO THE REVISED RULES OF THIS COURT.

Revised Rule 10 (2)(a) of this Court provides that the notice of appeal shall designate the judgment appealed from.

The notice of appeal sets forth an appeal "from the final judgment of the Supreme Court of the State of Ohio, affirming the judgment of the Seventh District Court of Appeals of Ohio, which affirmed the decree of the Court of Common Pleas for Mahoning County, Ohio, dated and entered in this action on December 22, 1965."

As the record before this Court and appellants' Jurisdictional Statement show, the Supreme Court of the State of Ohio did not enter any judgment and did not affirm the judgment of any lower court. Instead, the Ohio Supreme Court merely overruled a motion for an order to certify the record, and *sua sponte* dismissed the appeal which had been filed in that Court. (Jurisdictional Statement, pp. 27-28.) The appellants have thus attempted to appeal from a nonexistent judgment.

Without intending to waive our objection to the notice of appeal, we will assume throughout the remainder of the brief in support of these motions that the appellants intended to appeal from the judgment of the Seventh District Court of Appeals of Ohio.

We wish also to call to the attention of this Court the following two other peculiarities in the form of this appeal which make it difficult for appellees to know what matters appellants are attempting to bring to the attention of this Court.

This Court's Rule 10 (2)(a) requires the notice of appeal to specify the party or parties taking the appeal. The notice of appeal specifies as such party or parties only "Children of Israel Congregation, *et al.*" The Jurisdictional Statement, however, also lists Nathan Marks as an appellant. Under these circumstances, we are uncertain as to whether Mr. Marks is properly before this Court as an additional appellant.

The record which the appellants filed with this Court does not contain any of the pleadings and does not contain any of the testimony or other evidence. This resulted from appellants' listing in the designation of record of the following items: "Transcript of record filed in the Supreme Court of Ohio," and "Bill of Exceptions filed in the Supreme Court of Ohio." But no transcript of record and no bill of exceptions had ever been filed in the Supreme Court of Ohio, and, accordingly, those portions of the designation of record referred to nonexistent papers.

We notice that the Jurisdictional Statement filed by appellants makes several references to exhibits, and to pages of the record and to pleadings or briefs, but none of those documents was included in the record before this Court. Appellants appear to be asking this Court to determine this case in a vacuum, without presenting to this Court the facts upon which the appellants' assertions are based.

II. APPELLANTS HAVE NOT ASSERTED ANY CONSTITUTIONAL RIGHT OR IMMUNITY.

A religious belief by a party to litigation merely that other persons should engage, or refrain from engaging, in certain conduct does not give that party any standing under the First Amendment. Before the Constitutional effect of proposed state action can be considered, a party must satisfy the threshold requirement—he must allege and prove that the state action will infringe *his own* religious freedom. As this Court said in *McGowan v. Maryland*, 366 U. S. 420 (1961), one of the Sunday closing cases:

> "But appellants * * * do not allege any infringement of their own religious freedoms due to Sunday clos-

> ing. * * * Since the general rule is that 'a litigant may only assert his own constitutional rights or immunities' * * * we hold that appellants have no standing to raise this contention." (p. 429.)

There is nothing in the record whereby appellants have asserted that application of the Ohio disinterment statutes in the present situation will interfere with their own religious freedom.

The Question Presented, set forth in appellants' Jurisdictional Statement, asserts that "An Orthodox Jewish cemetery resisted an attempt to remove a body from its cemetery on the grounds that such removal was contrary to the basic religious tenets of its faith and belief," but there is no assertion that such removal would violate the conscience of any particular person. On page 5 of the Jurisdictional Statement, appellants assert that one Rabbi Schecter testified that the rule prohibiting disinterment is a basic precept of the Orthodox religion. As the Opinion of the Court of Appeals states (Jurisdictional Statement, pp. 16-17), Rabbi Schecter is not affiliated with the appellant cemetery but is, instead, the rabbi of a different congregation, Temple Emanuel. In effect, appellants asked the Courts below to determine by means of expert testimony what Orthodox Jewish law is on the subject of disinterment, and then to enforce that law against the appellees, who are persons not subscribing to Orthodox doctrines.

We respectfully submit that the First Amendment of the Constitution of the United States does not permit a cemetery to interfere with the rights given by society to others simply because the cemetery believes that religious law gives it a right to do so. If the rule were otherwise, any religious body could with impunity nullify many types of statutory and common law rights of other persons

by showing a religious belief that such rights of other persons should be abridged. Such a result would appear to be the "establishment of religion" which is itself unconstitutional under the First Amendment.

Where, as here, there is nothing in the record which would show that state action would infringe the religious freedom of any appellant, the appellants have not met the threshold requirement and have no standing to raise the Constitutional question.

III. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

There is nothing in the record which would indicate that the deceased or any member of the deceased's family was a member of the Children of Israel Congregation. There is nothing in the record indicating that the deceased wished to be buried in the cemetery operated by that Congregation or concerning their beliefs about disinterment. Even if a Constitutional question had been properly raised below, the only interested persons whose religious sensibilities could be offended by disinterment are the proprietors of the cemetery.

The Ohio statutes pursuant to which appellees brought this action create in appellees an unqualified right to have the bodies disinterred. The statutes are applicable to all next of kin regardless of their religion. They were passed long before either of the bodies in question was accepted by the cemetery for burial.

The appellants now contend that these statutes violate that portion of the First Amendment of the United States Constitution which states that Congress shall make no law "prohibiting the free exercise" of religion.

In so arguing, the appellants ignore the distinction between statutes which affect the right of persons to be-

lieve as they wish, and statutes which merely regulate conduct in order to protect rights of others. This Court has consistently pointed to this important distinction. In *Cantwell v. Connecticut*, 310 U. S. 296 (1940), this Court said of the First Amendment:

> "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. *The first is absolute but, in the nature of things, the second cannot be.* Conduct remains subject to regulation for the protection of society." (pp. 303-304.) (Emphasis supplied.)

In *Davis v. Beason*, 133 U. S. 333 (1890), this Court stated that the Amendment

> "was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, *not injurious to the equal rights of others*, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." (p. 343.) (Emphasis supplied.)

The Ohio statutes have no effect upon the freedom of anyone to believe as he chooses, or to attempt to convert others to his beliefs. They serve only to create a right in other persons, the next of kin, and to provide a means of enforcing that right.

The cases referred to by appellants are not relevant to the present case. *United States v. Ballard*, 322 U. S. 78 (1944) held only that a court may not question the sincerity with which a religious belief is held. No such question has been raised in this case.

Sherbert v. Verner, 374 U. S. 398 (1963), also relied upon by appellants, held that the denial of unemployment

nsation to one who, because of religious conviction, not work on Saturday violated the First Amend- ecause it met two conditions, neither of which has net by appellants in the present case.

rst, a burden on the free exercise of her religion posed upon the appellant in that case by the denial of state benefits given to persons without her reli- cruples. By contrast, the religious beliefs of appel- n the present case do not result in their receiving eatment by the state different from that accorded to s without their beliefs.

econd, in *Sherbert*, this Court found that the action state did not serve to enforce any compelling state t. It contrasted the situation before it with that had been presented in another of the Sunday closing s follows:

"In these respects, then, the state interest as- rted in the present case is wholly dissimilar to the terests which were found to justify the less direct rden upon religious practices in Braunfeld v. rown, 366 U. S. 599 (1961). The Court recognized at the Sunday closing law which that decision sus- ined undoubtedly served 'to make the practice of he Orthodox Jewish merchants') * * * religious eliefs more expensive,' 366 U. S., at 605. But the atute was nevertheless saved by a countervailing ctor which finds no equivalent in the instant case— strong state interest in providing one uniform day rest for all workers. That secular objective could achieved, the Court found, only by declaring Sun- y to be that day of rest." (p. 407.)

t in the present case the Ohio Legislature was rec- g and giving effect to a proper interest when it d to the next of kin the right to compel disinter- Even in jurisdictions which do not have a statute

such as Ohio's, the legitimate interest of the next of kin has always been considered in cases involving disinterment. Cf. *Yome v. Gorman,* 242 N. Y. 395, 152 N. E. 126 (1926). It was not unreasonable for the Ohio Legislature to express the public policy of this State by making unconditional the right of the next of kin.

If the position of the appellants was adopted, the feelings and wishes of the next of kin could no longer be taken into account in any state, whenever the cemetery authorities asserted opposition to disinterment, based upon religious grounds. In such cases only the wishes of the cemetery authorities could be considered, and the state would be prohibited from protecting the legitimate interest of the next of kin.

There are other times when a state may find it necessary to require bodies to be disinterred. The exercise of eminent domain serves as an example. Yet, if the appellants were correct in their contention that bodies may never be disinterred when contrary to the religious laws of the cemetery owners, all governments could be effectively prevented from ever removing bodies in order to use cemetery lands for a public purpose. This is not the law. See *United States v. Sixty Acres,* 28 F. Supp. 368 (E. D. Ill. 1939) in which the court said:

> "That it must be the law that lawful governmental progress or functions cannot be stayed by giving public cemeteries a permanently inviolable locus perpetually beyond the reach of the sovereign power of eminent domain, whether exercised by state or government, is apparent to one who gives the subject any mature consideration. That such is the accepted law is apparent from the very fact that great governmental projects, like the Norris Dam in Tennessee, similar in their essential physical needs and results to the project here involved, could not and would not

have been constructed had the law prevented the condemnation of public cemeteries and the removal of the bodies of the dead therefrom."

The interest of the next of kin should be considered as legitimate a subject for state protection as the interest of the public in making improvements through the use of the power of eminent domain. We respectfully submit that the conduct of cemetery authorities is subject to regulation by the Legislature in enforcing rights belonging to other persons.

IV. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED.

The appellants have not filed in this Court the pleadings or proceedings in the trial court, the Court of Common Pleas. There is nothing before this Court to show that the alleged Constitutional question was presented to that Court. That Court did, in its journal entries, expressly find that no Constitutional question *exists* under Articles (Amendments) I and XIV of the United States Constitution.

CONCLUSION.

It is respectfully submitted that this appeal should be dismissed for each of the reasons set forth in the foregoing motion.

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